Supreme Court, U.S.
FILED
JUL 31 2003
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No. 02-1752

In The

Supreme Court of the United States

HUGHES ELECTRONICS CORPORATION, INC. and DIRECTV, INC.,

Petitioners,

v.

ROBERT GARCIA, d/b/a DIRECT SATELLITE TV; D3 TECHNOLOGIES, INC.; CLEAR CHOICES II, LTD.; SWARTZEL ELECTRIC,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case presents a question that was recently decided by this Court in *Green Tree Fin. Corp. v. Bazzle*, 123 S.Ct. 2402 (2003): whether, as a matter of federal law, the Federal Arbitration Act prohibits certification of a class for purposes of arbitration when the underlying contract fails to expressly address the issue of classwide arbitration. In *Bazzle*, this Court held that nothing in the Federal Arbitration Act precludes certification of an arbitration class, and that issue must instead be resolved by interpreting the relevant contract pursuant to applicable state law. "The question here [is] whether the contracts forbid class arbitration. . . ." *Bazzle*, 123 S.Ct. at 2407. "[S]tate law, not federal law, normally governs such matters." *Id.* at 2406. *See also id.* at 2408 (Stevens, J., concurring in judgment) ("The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina").

In this case, Petitioners argue that this Court should grant certiorari on the basis that the FAA "does not permit classwide arbitration unless the parties have expressly agreed to such proceedings." Pet. at 12. In the wake of *Bazzle*, however, Petitioners' argument has washed away.

REASONS FOR DENYING THE WRIT

The petition for certiorari should either be dismissed as moot or denied because it fails to raise any federal question of importance. The question presented here has already been resolved by this Court in *Bazzle*, which eviscerates any basis for this Court to grant the petition and request merits briefing and argument. Moreover, the parties agree that the California Court of Appeals should now consider the impact of *Bazzle* and modify its judgment in light of that decision. *See* Respondents' Motion to Modify Judgment and Vacate Stay of Remittitur (filed in the California Court of Appeals on July 30). App. 1b. In light of Respondents' motion in the California court, there is no reason for this Court to grant the petition, vacate the judgment of the lower court, and remand to that court for further consideration in light of *Bazzle*.

Respectfully submitted,

STEVE BAUGHMAN JENSEN
Counsel of Record
Respondents Robert Garcia, et al.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT GARCIA, d/b/a DIRECT SATELLITE TV; D3 TECHNOLOGIES, INC., a Texas corporation; CLEAR CHOICES II, LTD., a Wisconsin corporation; and SWARTZEL ELECTRIC, a California partnership, on behalf of themselves and all others similarly situated,

Plaintiffs and Respondents,

vs.

DIRECTV, INC., a California corporation; HUGHES ELECTRONICS CORPORATION, a Delaware corporation; and DOES 1 through 100, inclusive,

Defendants and Appellants.

Unfair Competition Case
(*See* Bus. & Prof. Code § 17209 and
Cal. Rule of Court 15(e)(2))

Appeal from the Superior Court for the County of
Los Angeles Honorable Victoria G. Chaney,
LASC Case No. BC 259174

RESPONDENTS' MOTION TO MODIFY JUDGMENT AND VACATE STAY OF REMITTITUR AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TO THE HONORABLE COURT OF APPEAL:

Respondents hereby bring this Motion to Modify Judgment And Vacate Stay of Remittitur on the grounds that the United States Supreme Court has issued its order in *Green Tree Fin. Corp. v. Bazzle*, 123 S.Ct. 2402 (2003). There is no further need for maintenance of the stay.

DATED: July 30, 2003

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

All parties agree that, in light of the United States Supreme Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 123 S.Ct. 2402 (2003), this case must now be sent to an arbitrator. The reasons articulated by Appellants in support of their motion to stay issuance of remittitur no longer apply. Accordingly, Respondents respectfully move this Court to modify its judgment in light of *Bazzle* and issue remittitur to permit the trial court to send the case to arbitration.

I. PROCEDURAL HISTORY

This case involves tort and breach of contract claims brought against DirecTV, Inc. and Hughes Electronics Corporation (collectively, "DTV") by several independent distributors of DTV's satellite services. The form agreement between DTV and the plaintiffs specifies that disputes arising from the contractual relationship will be resolved by arbitration. Plaintiffs filed this lawsuit in October 2001, seeking certification of a class for purposes of arbitration. On April 17, 2002, the Honorable Victoria G. Chaney, Judge of the Los Angeles County Superior Court, ordered that the case would be sent to arbitration only after the court determined whether to certify a class. DTV appealed from that order, claiming that the Federal Arbitration Act precludes certification of a class for arbitration purposes. On December 11, 2002, this Court rejected DTV's argument and affirmed the trial court. DTV petitioned for review from the California Supreme Court; that petition was denied on February 25, 2003.

DTV subsequently filed a writ of certiorari in the United States Supreme Court, which remains pending. Meanwhile, DTV sought and received a stay of remittitur in this Court on the basis of its pending certiorari petition, and because the U.S. Supreme Court was deciding the same issue presented here in a case styled *Green Tree Fin. Corp. v. Bazzle.*[1] According to DTV, that stay was necessary for this

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[1] In their motion to stay remittitur, Defendants asserted that the *Bazzle* case "addresses the same issue involved in this case: whether the Federal Arbitration Act ("FAA") permits classwide arbitration when the parties have not expressly agreed to such a procedure." (*See* Defendants' Motion To Stay Issuance Of Remittitur at p. 1.)

Court to receive guidance from the U.S. Supreme Court regarding "the propriety of classwide arbitration under the FAA." (Motion to Stay Remittitur at 2.) Now that *Bazzle* has been decided, this Court should amend its judgment in response to that decision and release the remittitur to permit the parties to resolve their dispute. Although DTV's petition for certiorari remains pending, the only issue raised in that petition has already been resolved in *Bazzle*. As a result, either the Supreme Court will deny certiorari altogether, or it will remand to this Court for consideration of *Bazzle*. This Court need not and should not await that decision, but should instead take the *Bazzle* decision into account now so that this case can go forward.

II. THE *BAZZLE* DECISION

A. The Supreme Court Rejected DTV's Argument.

Just as DTV argued in this case, in *Bazzle* the petitioner contended that the Federal Arbitration Act precludes certification of a class for arbitration purposes when the contract does not expressly address the issue of whether classwide arbitration is permissible. In its opinion of June 23, 2003, the Supreme Court rejected that argument. The Court held that, even with respect to contracts governed by the Federal Arbitration Act, the issue of whether classwide arbitration is permissible under such contracts must be addressed by interpreting the contracts pursuant to state law. "The question here [is] whether the contracts forbid class arbitration . . . ." *Bazzle*, 123 S.Ct. at 2407. "[S]tate law, not federal law, normally governs such matters." *Id.* at 2406. *See also id.* at 2408 (Stevens, J., concurring in judgment) ("The Supreme Court of South Carolina has held as a matter of state law that class-action

arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina.").

B. The Supreme Court Held That Arbitrators Must Determine Whether to Certify a Class in Arbitration.

Although *Bazzle* reaffirmed this Court's decision that state law, and *not* the Federal Arbitration Act, governs whether an arbitration class is permissible, the *Bazzle* opinion also held that arbitrators, not courts, must make the certification decision. Accordingly, this Court should modify its decision by remanding to the trial court with instructions for the trial court to send the case to an arbitrator for all purposes, including class certification. "[I]f there is doubt about . . . the scope of arbitrable issues [ ] we should resolve that doubt in favor of arbitration." 123 S.Ct. at 2407 (internal citations and quotations omitted).

In *Bazzle*, the South Carolina Supreme Court had affirmed certification of arbitration classes in two cases involving the same defendant and the same course of conduct, which were consolidated when they reached that court. In the first case – *Bazzle* itself – a trial court had certified a class. In the second case, called *Lackey*, an arbitrator certified the class, but the plaintiffs referred the arbitrator to the court's certification decision in *Bazzle* as support. The United States Supreme Court held that an arbitrator in both cases should have made the class

certification decision without judicial intervention, and remanded the cases accordingly. 123 S.Ct. at 2408.

III. THIS COURT SHOULD NOW REMAND AND DIRECT THE TRIAL COURT TO SEND THE CASE TO ARBITRATION.

This Court should now release the remittitur with directions for the trial court to send the case to an arbitrator. Although this decision will reflect a modification of this Court's judgment consistent with *Bazzle*, nothing in *Bazzle* alters the legal reasoning set out in this Court's opinion issued in December 2002. Accordingly, Respondents urge the Court to reissue the same opinion, changing only the final directive to the trial court with reference to *Bazzle*.

DTV will suggest that this Court vacate its opinion, and DTV will also argue that the *Bazzle* decision invalidates this Court's authority to address the legal issue that has already been decided – whether the contract at issue in this case permits classwide arbitration. Given the particular contours of the arbitration clause in this case, this Court should spurn DTV's argument. Here, unlike in *Bazzle*, the arbitration clause specifically exempts issues of law from the arbitrator's authority: "The arbitrators shall not have the power to commit errors of law or legal reasoning." (Agreement Section 18.12 (App. at 381).) Although the *Bazzle* court contemplated that an arbitrator should make the determination of whether the contract permits classwide arbitration pursuant to the scope of the arbitration clause *in that case*, the scope of the arbitrator's authority *under this contract* does not extend to this legal question. This Court has already decided that question "'when the arbitration agreement between the parties is

silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [FAA].'" Slip op. at 7 (quoting *Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 60 (1998)).

Because this Court has already decided that issue, the arbitrator lacks authority to commit legal error by deciding the issue inconsistently with California law established by California courts. DTV should not now be permitted to beat this dead horse in front of the arbitrator. Such a result could land this case before this Court a second time, for review of the same issue it has already decided. DTV cannot now complain that the issue should have been decided in the first instance by the arbitrator, because DTV has failed to preserve any such timing concern in this appeal and has therefore waived it.

IV. CONCLUSION

For all these reasons, this Court should release remittitur with directions to the trial court to send the case to arbitration, and with directions to the arbitrator that DTV can no longer avail itself of the argument that the contract in this case fails to permit classwide arbitration.

DATED: July 30, 2003 Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 100 Wilshire Boulevard, Suite 700, Santa Monica, California 90401-1142.

On **July 30, 2003**, I served the foregoing document described as **RESPONDENTS' MOTION TO MODIFY JUDGMENT AND VACATE STAY OF REMITTITUR AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **July 30, 2003**, at Santa Monica, California.

Pamela K. Brisendine